RAJA ARSHAD RAJA TUN UDA & ANOR.

v.

THE DIRECTOR-GENERAL OF INLAND REVENUE

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI SCJ
HARUN HASHIM SCJ
GUNN CHIT TUAN SCJ
[CIVIL APPEAL NO. 488 OF 1988]
26 SEPTEMBER 1989

COMPANY LAW: *Receivers and managers - Appointment of - Realisation of assets to pay debenture holder - Payment of tax under Real Property Gains Tax Act 1976 - Not a question of priority.*

The appellants were appointed receivers and managers on 18 March 1988 in succession to the first receivers who had been appointed on 25 April 1983 pursuant to a debenture.

On the date of appointment of the 1st receivers, the company was indebted to the debenture holder for the principal sum of RM1,993,636.84 and interest at RM993,863.19. The 1st receivers sold the only asset of the company, a landed property, for RM1,993,636.24 on 5 February 1987.

On 18 July 1987, the Director-General of Inland Revenue informed the 1st receivers by notice of assessment that the tax payable on the disposal of the landed property was RM105,461.84 inclusive of a 10% increase for late payment as at 30 September 1987.

The appellants sought directions of the High Court under s. 183(3) of the Companies Act 1965 as to the priority of the payment of tax, since the balance of the proceeds, if the tax was paid, would not be sufficient to pay the debenture-holder in full.

It was held by the learned Judge at first instance that by virtue of s. 21(B)(1)(a) of the Real Property Gains Tax Act 1976, that the tax payable had priority over the amount due to the debenture holder.

Held:

[1] Where there is no winding-up and a receiver and manager is appointed, the federal tax is to be paid in accordance with the taxing statute concerned.

[2] It is the duty of the purchaser of the landed property who is the "acquirer" under s. 2 of the Real Property Gains Tax Act 1976 to retain the sum payable by the company as real property gains tax until the acquirer receives the Director-General's certificate of clearance under s. 21A of the Act.

[3] It was not a question of whether the federal tax is a preferential debt and the question of priority does not arise. It was a question of how and when the tax becomes payable and it should be paid by the company being the "chargeable" person under the Act.

[Appeal dismissed.]

Case referred to:
Re Golden Palace Medical Hall Sdn. Bhd. [1988] 2 MLJ 634

Legislation referred to:
Companies Act 1965, ss. 183(3), 191(2), 292(1)(f)
Real Property Gains Tax Act 1976, s. 21B(1)(a)
Service Tax Act 1975, s. 52(1)

For the appellants - Ramesh Sanghvi; M/s. Kassim Tadin Wai & Co.
For the respondent - Balia Yusof b. Hj. Wahi, SFC

JUDGMENT

Hashim Yeop Sani CJ:

The appellants were receivers and managers of Chemetics-Mega Sdn. Bhd. (the company) applied to the learned Judge in the High Court for directions under s. 183(3) of the Companies Act 1965.

Appellants were appointed receivers and managers on 18 March 1988 in succession to Chuah Teong Hooi and Anthony Geoffry Cooper who had been appointed on 25 April 1983 pursuant to a debenture. On the date of appointment of the first receivers the company was indebted to the Bank of Nova Scotia, the debenture holder, for the principal sum of RM1,993,639.84 and interest at RM993,863.19.

The appellants' predecessor sold the only asset of the company, a landed property, to one Messrs. K.K. Industries Sdn. Bhd. for RM1,993,639.24 on 25 February 1987.

On 18 July 1987 by a notice of assessment the Director-General of Inland Revenue informed the appellants predecessor that the tax payable on the disposal of the landed property was RM105,461.84 inclusive of a 10% increase for late payment as at 30 September 1987. It is in respect of the payment of this tax that the appellants came before the learned Judge for directions as to the priority of payment of the tax since the balance of the proceeds of sale is not sufficient to pay the debenture holder in full if tax is paid in priority to the debt due to the debenture holder.

The learned Judge in the course of her judgment referred to the decision of another High Court Judge in *Re Golden Palace Medical Hall Sdn. Bhd.* [1988] 2 MLJ 634. In *Re Golden Palace* the receiver managed to recover from an insurance company a sum of RM295,000 but the Department of Customs and Excise claimed that the sum of RM103,520 being arrears of service tax had priority over all other claims.

By virtue of s. 292(1)(f) of the Companies Act 1965 in a winding-up federal tax ranks sixth in priority if the federal tax is assessed under any written law before the date of the commencement of the winding-up or assessed at anytime before the time fixed for the proving of debts has expired. This provision is one of the two provisions omitted in s. 191(2) of the Companies Act 1965 in the application of preferential debts where a receiver is appointed pursuant to a debenture.

The learned Judge in *Re Golden Palace* placed great significance on the omission of reference to paras. (a) and (f) of s. 292(1) in s. 191(2) of the Companies Act. The learned Judge then circumvented what he thought was a lacuna in the law by applying the rule that a later statute must prevail over an earlier one. The tax he was concerned with was payable under the Service Tax Act 1975 which was a law enacted after the passing of the Companies Act 1965. He said in his judgment:

> In my judgment, the answer should be obvious that the earlier Companies Act 1965 must give way to the later Service Tax Act 1975 because this is one of the elementary rules of interpretation of statutes as *lex posterior derogat priori*.
>
> I therefore concluded that the claim of the said department was to be paid first before the claim for the said principal and interest of the debenture holder, i.e., the bank.

The learned Judge in the present case however considered that by virtue of s. 21B(1)(a) of the Real Property Gains Tax Act 1976 the tax has priority over the amount due to the debenture holder. She summarised her reasoning in her judgment as follows:

> Since gains tax is payable on the sale and the applicants have been served with a notice of assessment, they must by virtue of the retention provision contained in s. 21B(1)(a) set aside RM105,461.84 and it is this same retention provision that makes payments of the gains tax a priority debt over the amount due to the debenture holder.

Applicable in *Re Golden Palace* was the Service Tax Act 1975 where s. 52(1) thereof reads as follows:

> (1) Where a receiver is appointed of the property of person to whom a licence under s. 8 is issued the receiver shall give notice thereof to the Director-General within fourteen days after the appointment being made and shall before disposing of any of the assets set aside such sum out of the assets as appears to the Director-General to be sufficient to provide for any service tax that is or will thereafter become payable in respect of the taxable service that have been provided by that person before the appointment of the receiver.

The relevant taxing law in the present case is the 1976 Act and s. 21B(1)(a) thereof reads as follows:

> 21B. (1) Where on a disposal to which s. 13 applies, the consideration consists wholly or partly of money:
>
> (a) the acquirer shall, until he receives the Director-General's certificate of clearance under s. 21A, retain the whole of that money (subject to the reservation that the money retained shall not exceed a sum calculated at the rate at which the tax is for the time being chargeable, on the total value of the consideration).

There is no real lacuna in the law. In a winding up federal tax ranks sixth as preferential debt as referred to earlier i.e., by virtue of s. 292(1) of the Companies Act. Where however there is no winding up and a receiver and manager is appointed as in this case the federal tax is to be paid in accordance with the taxing statute concerned.

It is clear as the learned Judge in this case pointed out that it is the duty of the purchaser of the landed property, in this case Messrs. K.K. Industries Sdn. Bhd., who is the "acquirer" under s. 2 of the Real Property Gains Tax Act 1976 to retain the sum payable by the company as real property gains tax until the acquirer receives the Director-General's certificate of clearance under s. 21A of the Act.

It is not therefore a question of whether the federal tax is a preferential debt. It is only a question of how and when that tax becomes payable and should be paid by the company being the "chargeable" person under the Act.

In this case the acquirer did not comply with what it was statutorily bound to do under s. 21B(1) of the Act but had instead passed the whole amount of the purchase price to the receivers. The receivers had therefore received a sum part of which they ought not to have received. The Director-General of Inland Revenue was entitled to the sum of RM105,461.84 being the amount of tax payable on the disposal of the landed property. As far as the tax is concerned the question of priority does not arise.

The appeal is accordingly dismissed. We make no order as to costs.

Also found at [1990] 1 CLJ 39